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Motion to Bring up Record

U.S. SUPREME COURT
FILED

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MRS. H. McKENNEY, CLERK

Filed Dec. 12, 1898.
Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 485.

THE SECURITY TRUST COMPANY, as Assignee of
D. D. Merrill Company, insolvent,

Plaintiff in Error.

vs.

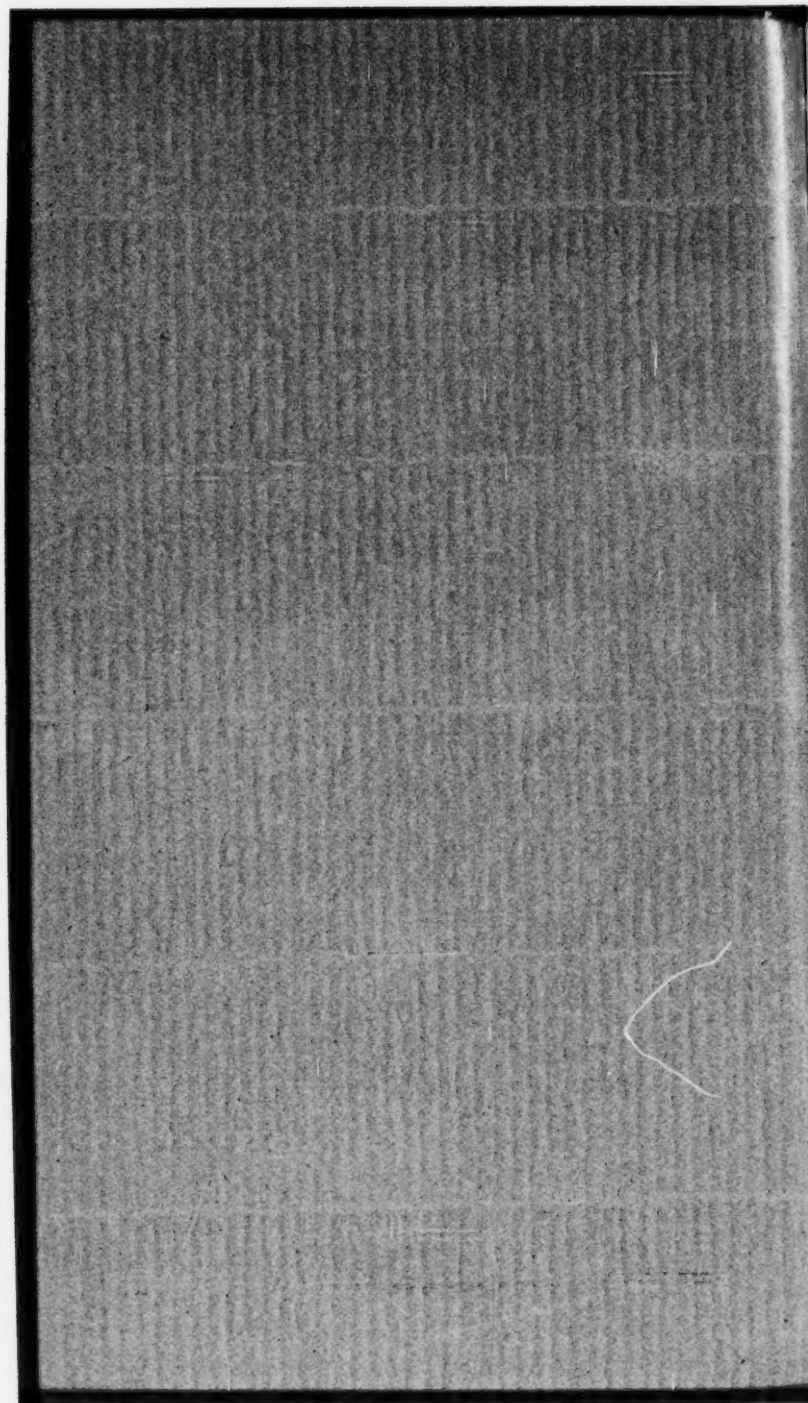
FRANK H. DODD, ET AL., copartners as Dodd, Mead
& Co.,

Defendants in Error.

PETITION FOR CERTIORARI.

MARKHAM, MOORE & MARKHAM,

Counsel for Defendants in Error.



In The
Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 495.

THE SECURITY TRUST COMPANY, as Assignee of
D. D. Merrill Company, insolvent,

Plaintiff in Error.

vs.

FRANK H. DODD, ET AL., copartners as Dodd, Mead
& Co.,

Defendants in Error.

To the Honorable, the Supreme Court of the United
States:

Your petitioners, Frank H. Dodd, Bleecker Van
Wagenen and Robert H. Dodd, defendants in error
herein, respectfully represent and show to this Hon-
orable Court:

That this is a suit at law brought in the district
court of the State of Minnesota, by the plaintiff in
error against the defendants in error, to recover the
sum of ten thousand dollars as damages for the al-
leged conversion of certain articles of personal prop-

erty. The defendants in error, two of whom are citizens of the state of New York, and one a citizen of the state of New Jersey, removed the cause into the Circuit Court of the United States for the district of Minnesota, where the same was tried and submitted upon the pleadings and an agreed statement of facts, upon which the circuit court gave judgment for the defendants. Thereafter on application of the plaintiff, the cause was removed by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and was argued and submitted to that court for its decision.

The Circuit Court of Appeals has certified to this court two questions or propositions of law, concerning which it desires the instruction of this court for its proper decision.

Your petitioners, under and pursuant to the act entitled, "An Act to establish circuit courts of appeals and to define and regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, now respectfully present to this Honorable Court a certified copy of the entire record of this case in the Circuit Court of Appeals, and thereupon respectfully petition this Honorable Court that it may require and direct that the whole record and cause may be sent up to it for its consideration, to the end that the whole matter in controversy between the parties in this suit may be decided by this Honorable Court.

Your petitioners respectfully represent that the agreed statement of facts upon which the cause was presented to, and decided by, the Circuit Court will be found on page 5 of the transcript of the record so certified by the Circuit Court of Appeals and presented herewith, and that the statement of facts and the certificate made by the judges of the Circuit Court of Appeals, with the questions of law concerning which the instruction of this Honorable Court is asked, appear at length in said transcript of record at pages 24 to 29 inclusive.

The questions upon which the Circuit Court of Appeals desires the instruction of this Honorable Court, are:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualifications as assignee thereunder vest said assignee with the title to the personal property aforesaid then located in the State of Massachusetts and in the custody and possession of said Alfred Mudge and Sons.

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge and Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the Superior Court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had

notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim."

Your petitioners most respectfully represent that they are advised that an answer to these questions will not necessarily determine the right of the plaintiff in error to maintain this suit, and your petitioners desire to urge upon the consideration of this court that such title as the plaintiff in error acquired by virtue of the assignment from the D. D. Merrill Company under the insolvency laws of the State of Minnesota, was a qualified title at the most, which the courts of Massachusetts might recognize, by virtue of the *comity* existing between the states, or might refuse to recognize in its discretion, (Greene v. Van Buskirk, 7 Wall. 339; Paine v. Lester, 44 Conn. 196) and that the effect of the proceedings had in the courts of the State of Massachusetts in the suit in which the defendants in error were plaintiffs and the D. D. Merrill Company was defendant, was to vest in your petitioners as purchasers at the execution sale in that proceeding, a complete title to the property in controversy without respect to any other consideration whatever; and they desire to urge that the plaintiff in error, with full knowledge of the proceedings taken against the property in controversy in Massachusetts, having stood by and without any interference allowed your petitioners to proceed to judgment, and condemnation of the property by the Massachusetts court, cannot in this suit

call in question the validity of the title thus acquired, for the reason that in this suit, brought in the State of Minnesota, full faith and credit must be given to the judicial proceedings of the courts of the State of Massachusetts.

Green v. Van Buskirk, 7 Wall. 339.

The record discloses that *there was no delivery of the property* in controversy to the plaintiff in error as assignee to the D. D. Merrill Company, and under the laws of the state of Massachusetts the delivery of possession is essential to the validity of a conveyance of personal property situated in that state. *Lanfear v. Summer*, 17 Mass. 109; *Hallgarten v. Oldham*, 135 Mass. 1.

And your petitioners respectfully represent that these considerations upon the facts disclosed by the accompanying record bring this case directly within the decision of this court in the case of *Green Van Buskirk*, 5 Wall., 307, 7 Wall. 339, followed and approved in *Hervey v. R. I. Loco. Works*, 93 U. S. 664; *Cole v. Cunningham*, 133 U. S. 107; *Lawrence v. Bachelor*, 131 Mass. 504; *Cunningham v. Butler*, 142 Mass. 47; and that the additional circumstances that your petitioners had notice of the assignment of the D. D. Merrill Company prior to the attachment of the property in question, is not important, as the rights of an attaching creditor is in no way affected by notice, or

want of notice, of a prior assignment by the debtor. *Paine v. Lester*, 44 Conn. 196; *Willits v. Waite*, 25 N. Y. 577; *Barth v. Backus*, 140 N. Y. 230; *Catlin v. Wilcox*, 123 Ind. 477.

Your petitioners further represent that an argument and discussion of the question last suggested is essential to a complete presentation and discussion of the questions certified by the Circuit Court of Appeals to this court for its consideration, and it is desirable that while the cause is in this court the whole question in controversy between the parties be determined. The record is brief and can, without difficulty, be prepared for presentation to the court at this term in the usual course, and the briefs of counsel have not yet been prepared or printed. And your petitioners most humbly pray that this Honorable Court will grant their request that it cause the whole record in this case to be sent to this court for its consideration and decision.

JAMES E. MARKHAM,

A. R. MOORE and

GEO. W. MARKHAM,

Counsel for Defendants in Error.